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June 17, 2002

OFFICE OF THE
EXECUTIVE SECRETARY

David Waddell, Esq.
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: *Complaint of US LEC of Tennessee, Inc. Against Electric Power Board of Chattanooga*

Docket No. 02-00562

Dear Mr. Waddell:

Please find enclosed the original and thirteen copies of the Response of US LEC to the Motion to Dismiss filed in the above-captioned proceeding.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:

Henry Walker
Henry Walker

HW/nl
Enclosure
c: Parties

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE: COMPLAINT OF US LEC OF)
TENNESSEE, INC. AGAINST ELECTRIC) DOCKET NO. 02-00562
POWER BOARD OF CHATTANOOGA)

RESPONSE TO MOTION TO DISMISS

US LEC of Tennessee, Inc. ("US LEC") submits the following response to the Motion to Dismiss filed by the Electric Power Board of Chattanooga ("EPB").

EPB has filed a Motion to Dismiss the complaint filed by US LEC on the grounds that US LEC can prove no set of facts in support of its claims for relief because (1) EPB Telecommunications is an appropriate name for EPB's telecommunications operations, (2) EPB has not denied other telecommunications carriers access to its underground facilities, and (3) EPB's internal auditors have issued internal audit reports concerning EPB's compliance with the "Proposed Conditions" and the "Code of Conduct" imposed by the TRA but EPB contends that it is not required to file those reports with the TRA.

STANDARD OF REVIEW

Rule 12.02(6) of the Tennessee Rules of Civil Procedure provides for a motion to dismiss for "failure to state a claim upon which relief can be granted." *See* Tenn. R. Civ. P. 12.02(6). A motion to dismiss tests only the sufficiency of the complaint, not the plaintiff's proof. *See Merriman v. Smith*, 599 S.W.2d 548, 560 (Tenn. Ct. App. 1979); *See also Wolcotts Fin. Serv., Inc. v. McReynolds*, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990). According to the court in *Cook v. Spinnaker's of Rivergate, Inc.*, "[i]n scrutinizing the complaint in the face of a Rule 12.02(6) motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact therein as true." *See Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). Furthermore, Motions to Dismiss should be *denied* unless "it appears

that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief.”
See id. (citing *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978)).

ARGUMENT

1. US LEC’s first complaint is that EPB has clearly and repeatedly violated the TRA’s “Proposed Conditions” which were designed to insure that EPB’s telecommunications operations are not cross-subsidized, directly or indirectly, by EPB’s electric operations. Those Proposed Conditions, which include a “Code of Conduct,” were incorporated into the TRA’s final Order authorizing EPB to obtain a license as a competing local exchange carrier pursuant to T.C.A. § 7-52-401 *et seq.*

To prevent cross-subsidization and to avoid giving EPB’s telecommunications operations an unfair advantage over other carriers, the Proposed Conditions require that EPB and EPB’s telecommunications division inform consumers of the “separate identities” of the two operations.

EPB has not complied with that requirement. US LEC has alleged in its complaint -- and will demonstrate at the hearing -- that EPB intentionally presents its electric and telephone operations as intertwined. This not only violates the TRA’s Proposed Conditions but violates the statutory prohibition against cross-subsidization by giving EPB Telecom the free use of the good will and reputation of EPB. Under T.C.A. §7-52-402, municipal electric systems are expressly prohibited from subsidizing their telecommunications operations. The statute makes no exceptions for cases in which the telecommunications operations are part of the same legal entity as the electric systems. The Proposed Conditions also do not provide for this type of exception. Regardless of the organizational structure of the services, cross subsidization is prohibited. EPB’s Motion to Dismiss does not address these issues but simply sidesteps them by saying that the two entities are legally part of the same organization and may therefore have the same, or similar, names and there is nothing improper about that arrangement. Meanwhile, EPB

continues to ignore and violate the “separate identities” requirement in the TRA Order. This is clearly a matter which the TRA needs to address in this proceeding.

2. US LEC’s second complaint is that EPB may have engaged in discrimination and cross-subsidization by allowing its telecommunications division – but not other carriers – to use the electric company’s building access facilities.

As the Authority is aware, competing local exchange carriers must obtain access to buildings in order to serve customers inside the buildings. This has been a very contentious issue because some building owners and managers require that CLECs pay access fees, often calculated as a percentage of revenue, in order to gain entrance. As the sole provider of electric service in Chattanooga, EPB already has access to all buildings and pays no access fees. If EPB Telecom is allowed to use those same facilities without having to pay the same building access fees that other CLECs pay, that would give EPB Telecom a significant and unfair competitive advantage over other carriers.

Without conducting discovery, US LEC has no way of determining whether EPB Telecom is, in fact, “piggybacking” on EPB’s electric operations in order to gain building access and, if so, the extent of that sharing and how it is accounted for on the books of EPB Telecom.

In the Motion to Dismiss, EPB seems to acknowledge that EPB Telecom is taking the advantage of the electric rights-of-way owned by EPB. If so, state law and the Proposed Conditions Order require that EPB make those facilities available to all CLECs under the same terms and conditions required of EPB Telecom.

Absent discovery, it is not possible for the parties or the Authority to fully address the concerns raised by US LEC or to insure that the “level playing field” required by state law has been achieved. It would be inappropriate to dismiss this complaint before the parties have the opportunity to investigate further.

3. US LEC's third complaint is that the TRA has ordered EPB to conduct annual audits to determine whether EPB has complied with the Code of Conduct and ordered EPB to file those audits with the Authority. Although EPB claims to have conducted the audits, EPB has not yet produced them and claims that the company is not required to make the audit results publicly available by filing them at the TRA. The Motion to Dismiss asserts that there is no filing requirement despite the plain statement in the TRA's Order of May 10, 1999, that "EPB will provide the results of any such audits to the Authority." EPB argues weakly that the proposed Conditions contain no such requirement and that the agency's explicit language was intended only to "summarize" rather than "revise" the Proposed Conditions.

The Proposed Conditions are, at best, ambiguous. EPB is required to conduct the audits and to "issue a statement detailing EPB's compliance with the Code of Conduct." The Conditions do not indicate how the "statement" is to be "issued." It is certainly reasonable to assume, as the agency apparently did, that EPB would comply with that requirement by filing the audit with the Authority, just as other regulated carriers are required to file annual and quarterly reports at the TRA. EPB's interpretation of the Proposed Conditions makes little sense. The audits hardly serve their intended purpose if no one outside EPB ever reads them or if the statement of compliance is never "issued" to anyone else.

In any event, it is clear from the language of the TRA's order that the Authority understood that the audits would be filed with the agency. Whether the Authority believed that the Proposed Conditions implicitly required such filing or whether the Authority decided to impose that requirement on its own is, at bottom, irrelevant. The language of the Authority's order is clear. The audits must be filed with the agency.

Finally, even if EPB were correct in its reading of the Proposed Conditions, the TRA and the CLECs cannot effectively monitor and enforce the Proposed Conditions (which were adopted

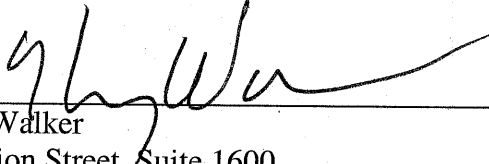
for the very purpose of protecting CLECS from the kind of conduct described in this complaint) unless the audits are publicly available. To the extent there is any ambiguity on this requirement, US LEC will present argument and testimony urging the Authority to clarify that ambiguity and to direct that all audits be filed and made available for public inspection. There is certainly no basis for granting the Motion to Dismiss until the TRA has been given the opportunity to address this issue.

For these reasons, the Motion to Dismiss should be denied.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 18th day of June, 2002.

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